

JUL 31 2008

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD ANTHONY THROOP,

Petitioner - Appellant,

v.

KATHLEEN A. PROSPER,

Respondent - Appellee.

No. 06-55044

D.C. No. CV-05-04312-GPS

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the Central District of California  
George P. Schiavelli, District Judge, Presiding

Submitted July 22, 2008<sup>\*\*</sup>

Before: B. FLETCHER, THOMAS, and WARDLAW, Circuit Judges.

California state prisoner Edward Anthony Throop appeals from the district court's order dismissing his 28 U.S.C. § 2254 petition as premature. We have

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<sup>\*</sup> This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

<sup>\*\*</sup> The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

jurisdiction pursuant to 28 U.S.C. § 2253, and we vacate the district court's dismissal of the petition and remand for further proceedings.

Both parties agree that the district court abused its discretion by denying Throop's motion to stay his § 2254 habeas petition and dismissing the petition as premature, without considering whether to stay the mixed petition to allow Throop to exhaust his claims in state court. *See Jackson v. Roe*, 425 F.3d 654, 661 (9th Cir. 2005). Accordingly, we remand to the district court to apply the stay-and-abeyance test. *See Rhines v. Webber*, 544 U.S. 269, 278 (2005).

**VACATED AND REMANDED.**